



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations  
of International Humanitarian Law  
Committed in the Territory of the  
former Yugoslavia since 1991

Case No.: IT-05-88-T

Date: 10 January 2008

Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Presiding  
Judge O-Gon Kwon  
Judge Kimberly Prost  
Judge Ole Bjørn Støle – Reserve Judge

**Registrar:** Mr. Hans Holthuis

**Decision of:** 10 January 2008

**PROSECUTOR**

v.

**VUJADIN POPOVIĆ  
LJUBIŠA BEARA  
DRAGO NIKOLIĆ  
LJUBOMIR BOROVČANIN  
RADIVOJE MILETIĆ  
MILAN GVERO  
VINKO PANDUREVIĆ**

**PUBLIC**

**DECISION ON THE BEARA MOTION FOR RECONSIDERATION AND  
BEARA AND NIKOLIĆ JOINT MOTION FOR CERTIFICATION OF THE  
DECISION DENYING MOTION FOR A *SUBPOENA DUCES TECUM*  
COMPELLING MOMIR NIKOLIĆ TO DISCLOSE HIS PERSONAL  
NOTES**

**Office of the Prosecutor**

Mr. Peter McCloskey

**Counsel for the Accused**

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović  
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara  
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić  
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin  
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić  
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero  
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

**THIS TRIAL CHAMBER** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”);

**BEING SEISED OF** the “Defence Motion on Behalf of Ljubisa Beara Seeking Reconsideration of the Trial Chamber’s Oral Decision Dismissing Expedited Motion to Issue a *Subpoena Duces Tecum* on Momir Nikolić” filed confidentially on 9 November 2007 (“Beara Motion for Reconsideration”) and the “Joint Defence Motion for Certification of Trial Chamber’s Oral Decision Dismissing Expedited Motion Requesting the Trial Chamber to Issue a *Supoena Duces Tecum* on Momir Nikolić” filed jointly by Beara and Nikolić on 9 November 2007 (“Beara and Nikolić Motion for Certification”);

## I. PROCEDURAL HISTORY AND PARTIES’ SUBMISSIONS

**RECALLING** that on 29 October 2007, Beara filed a confidential “Expedited Motion Requesting the Trial Chamber to Issue a *Subpoena Duces Tecum*, Compelling Momir Nikolić to Fully Disclose his Personal Notes to the Defence” (“Beara Motion for Subpoena of Personal Notes”);

**RECALLING** that appended to the Beara Motion for Subpoena of Personal Notes were an e-mail and memo from the Office of the Prosecutor stating that Momir Nikolić, who was then scheduled to be a witness in this case, had a “large number” of notes that he refused to give to the Prosecution because they were private and written in preparing the defence in his own trial;<sup>1</sup>

**RECALLING** that Beara contended that a *subpoena duces tecum* for Momir Nikolić’s notes was required to ensure a fair trial and “full disclosure of facts within the rights of the Accused” as the notes may contain information bearing on the credibility of the witness and provide potentially exculpatory information;<sup>2</sup>

**RECALLING** that on 31 October 2007, the Prosecution filed its confidential “Response to Beara Defence Motion Requesting Disclosure of Momir Nikolić’s Personal Notes” (“Prosecution Response to Motion for Subpoena of Personal Notes”) arguing:

- a. Momir Nikolić is not required by his plea agreement to disclose his personal notes;<sup>3</sup>
- b. there is no inequality of arms because the Prosecution as well as the defence lack the notes;<sup>4</sup>

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<sup>1</sup> Beara Motion for Subpoena of Personal Notes, Appendices A–B. *See also* T. 16123 (10 October 2007) (statement of Mr. McCloskey, Office of the Prosecutor) (describing notes).

<sup>2</sup> Beara Motion for Subpoena of Personal Notes, paras. 6–7, 9–10, 15, 17, 22–23.

<sup>3</sup> Prosecution Response to Motion for Subpoena of Personal Notes, paras. 1, 13.

- c. any claim of exculpatory information in the notes is speculative; rather, the Defence is conducting a “fishing expedition” and a subpoena should not be issued on that ground;<sup>5</sup> and
- d. there is no legal authority mandating disclosure of the notes of a witness made in preparation of his defence; such notes are distinct from archival material or notes made at the time of events described during testimony and used as an aid to memory;<sup>6</sup>

**RECALLING** that on 2 November 2007, the Prosecution orally notified the Trial Chamber that it would not be calling Momir Nikolić because he was deemed adverse to the Prosecution case and had made statements perceived by the Prosecution as not credible;<sup>7</sup>

**RECALLING** that on 2 November 2007, the Trial Chamber issued an oral decision (“Impugned Decision”) reasoning that the Motion for Subpoena of Personal Notes was not necessarily mooted by the Prosecution’s withdrawal of Momir Nikolić as a witness because he could be called by the Trial Chamber or the defence;<sup>8</sup>

**RECALLING** further that the Impugned Decision accepted the Prosecution’s arguments and ruled that the Beara Motion for Subpoena of Personal Notes was meritless, noting that the motion provided no basis in the Rules or jurisprudence of the Tribunal for the compulsion sought;<sup>9</sup>

**NOTING** that the Beara Motion for Reconsideration asserts:

- a. the Impugned Decision was erroneously based on acceptance of a purported Prosecution argument that the Trial Chamber lacked the power to issue a *subpoena duces tecum* to a witness;<sup>10</sup>
- b. the Trial Chamber should have compelled disclosure under Rule 89(B) though the Rules and the Tribunal’s jurisprudence have not specifically addressed the issue because the notes might have exculpatory information;<sup>11</sup> and
- c. the Accused are “third party beneficiaries” to Momir Nikolić’s plea agreement with the Prosecution and therefore have standing to assert a purported violation of the plea agreement;<sup>12</sup>

<sup>4</sup> *Ibid.*, para. 13.

<sup>5</sup> *Ibid.*, para. 12.

<sup>6</sup> *Ibid.*, paras. 1, 4, 10.

<sup>7</sup> T. 17398, 1740-1741 (2 November 2007).

<sup>8</sup> T. 17402 (2 November 2007).

<sup>9</sup> *Ibid.*

<sup>10</sup> Beara Motion for Reconsideration, paras. 9-10, 15-17.

<sup>11</sup> *Ibid.*, paras. 9, 19, 25-28, 31.

<sup>12</sup> *Ibid.*, paras. 33-36.

**NOTING** that the Beara and Nikolić Motion for Certification, filed in the alternative, if the Beara Motion for Reconsideration is denied,<sup>13</sup> asserts that “it is highly likely, if not certain,” that Momir Nikolić’s notes may “confirm or infirm” information in the statement of facts appended to his plea agreement as well as provided during his testimony in another case and is thus likely to assist in expeditiously preparing the defence and affect the outcome in this case and permit determination of whether there was “a miscarriage of justice” in the earlier case in which he testified;<sup>14</sup>

**NOTING** the “Prosecution Consolidated Response to Defence Motions Requesting Reconsideration or Certification of Decision Denying Disclosure of Momir Nikolić’s Personal Notes” (“Prosecution Consolidated Response”) filed confidentially on 23 November 2007;

**NOTING** the “Joint Defence Motion Seeking Permission to Reply and Reply to Prosecution Consolidated Response to Defence Motions Requesting Reconsideration or Certification of Decision Refusing to Issue a *Subpoena Duces Tecum* for the Disclosure of Notes Produced by Momir Nikolić” (“Beara and Nikolić Reply”) filed confidentially on 30 November 2007 and seeking leave pursuant to Rule 126 *bis* to reply to the Prosecution Consolidated Response<sup>15</sup>;

**CONSIDERING** that though the Beara and Nikolić Reply largely reiterates contentions in previous filings, the Reply clarifies that Beara and Nikolić are asserting that the Impugned Decision was predicated on the belief that “the Trial Chamber does not have the authority to issue a *subpoena duces tecum* specifically for the production of Momir Nikolić’s Notes”<sup>16</sup> rather than a purported belief that the Trial Chamber lacked the power to subpoena a witness to produce evidence,<sup>17</sup> and leave to file the Beara and Nikolić Reply should therefore be granted;

## II. BEARA MOTION FOR RECONSIDERATION

**NOTING** that Rule 54 of the Rules of Procedure and Evidence (“Rules”) provides that a Trial Chamber may issue subpoenas “as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial”;

<sup>13</sup> Beara and Nikolić Motion for Certification, para. 1.

<sup>14</sup> *Ibid.*, paras. 12–19, 21–27. *See also ibid.*, paras. 28–34 (asserting that immediate resolution will materially advance proceedings in this case).

<sup>15</sup> Beara and Nikolić Reply, para. 1.

<sup>16</sup> *Ibid.*, para. 8.

<sup>17</sup> In contrast, the Beara Motion for Reconsideration had asserted that the Impugned Decision was premised on a purported Prosecution argument “that the Trial Chamber did not have the power to order a *subpoena duces tecum* to a witness”. Beara Motion for Reconsideration, para. 9. *Cf.* Beara and Nikolić Reply, para. 6 (acknowledging later that the Prosecution had “recognized that ‘a Trial Chamber may issue a subpoena requiring a witness to produce evidence before the Chamber pursuant to Rule 54’”).

**NOTING** that “[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction”;<sup>18</sup>

**NOTING** that the applicant seeking a subpoena must make an evidentiary showing of need for the subpoena and that the Trial Chamber “is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the subpoena is not abused;”<sup>19</sup>

**NOTING** that the Beara Motion for Reconsideration and Beara and Nikolić Reply misunderstand the Impugned Decision — the Trial Chamber did not rule it lacked the power to issue a *subpoena duces tecum*; rather the Trial Chamber ruled that there was no basis in the Rules or the Tribunal’s jurisprudence for Beara’s assertion that he was entitled to compelled disclosure of the personal notes that Momir Nikolić made in preparation of his defence;

**CONSIDERING** that reconsideration of a decision is permitted in exceptional cases “if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice”<sup>20</sup> and the party urging reconsideration satisfies the Trial Chamber that there are circumstances justifying reconsideration to prevent injustice;<sup>21</sup>

**CONSIDERING** that no clear error of reasoning has been demonstrated and the Trial Chamber is not satisfied that there are circumstances justifying reconsideration to prevent injustice;

### III. BEARA AND NIKOLIĆ MOTION FOR CERTIFICATION

**CONSIDERING** that Rule 73(B) provides that “[d]ecisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious

<sup>18</sup> *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 399; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 31. See also *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 10 (“*Halilović* Appeal Decision”) (“Being a mechanism of judicial compulsion, backed up by the threat and the power of criminal sanctions for non-compliance, the subpoena is a weapon which must be used sparingly.”).

<sup>19</sup> *Halilović* Appeal Decision, para. 6.

<sup>20</sup> Decision on Defence Motion Requesting Reconsideration or Certification of Decision Admitting Exhibits with Testimony of Witness 168, 20 July 2007, pp. 4–5 and note 26 (“Decision of 20 July 2007 on Motion Requesting Reconsideration or Certification”). See also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’appelant en reconsidération de la décision du 4 avril 2006 en raison d’une erreur matérielle”, 14 June 2006, para. 2 (stating the standard of the Appeals Chamber of both ICTY and ICTR for reconsideration of interlocutory appeals decisions).

<sup>21</sup> Decision of 20 July 2007 on Motion Requesting Reconsideration or Certification, p. 5 and note 27. See also *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2 (considering that for an appellant to succeed in requesting reconsideration of an Appeals Chamber decision, “he must satisfy the Appeals Chamber of the existence of a clear error of reasoning in the Decision, or of particular circumstances justifying its reconsideration in order to avoid injustice”).

conduct of the proceedings or the outcome of the trial, and for which [. . .] an immediate resolution by the Appeals Chamber may materially advance the proceedings”;

**CONSIDERING** that the Trial Chamber is not satisfied that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that the conjecture and assertions in the Beara and Nikolić Motion for Reconsideration do not amount to such a showing;

**CONSIDERING** that the first requisite for certification is therefore unmet and certification should not be granted;

**PURSUANT TO** Rules 54, 73(B) and 126 *bis* of the Rules,

**HEREBY ORDERS AS FOLLOWS:**

1. Leave to file the Beara and Nikolić Reply is granted.
2. The Beara Motion for Reconsideration is denied.
3. The Beara and Nikolić Motion for Certification is denied.

Done in English and French, the English text being authoritative.



Carmel Agius  
Presiding

Dated this tenth day of January 2008  
At The Hague  
The Netherlands

[Seal of the Tribunal]